Supreme Court, U.S.
FILED
04-1426 APR 23 2005
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Mary Catherine Baur,

Petitioner

v.

Pennsylvania State Civil Service Commission
(Department of Labor & Industry),

Respondent(s)

On Petition For Writ Of Certiorari
To The Commonwealth Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Whether Petitioner has standing to challenge her non-promotion in the Pennsylvania state civil service due to gender discrimination.

II. Whether, when there is a challenge of gender discrimination under 71 P.S. Section 741.951(b) in an employment practice enumerated under 71 P.S. Section 741.905a, Respondent has discretion to deny a hearing on the merits.

(a). Whether Petitioner met her prima facie burden under the McDonnell Douglas[1]/Burdine[2] test and in the alternative under Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992).

(b). Whether Respondent's choice to use the "employment" list instead of the "promotion" list was evidence of intentional discrimination against Petitioner on the basis of gender to deny her promotion in the Pennsylvania state civil service.

(c). Whether the Respondent's finding in Zanotto v. SCSC, (Appeal No. 24004) of a technical error in the eligible list is equivalent to discrimination per se and entitles Petitioner to the next available position.

III. Whether Petitioner's appeal to the Commonwealth Court of Pennsylvania was frivolous and warranted an award of attorney's fees and costs for the Indispensable Party.

IV. Whether Respondent violated Petitioner's constitutional due process rights.

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[1] McDonnell Douglass v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973).

[2] Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Opinion of the Commonwealth Court appears at Appendix C to the application. The Opinion is unpublished and filed on April 1, 2004.

Decision of the State Civil Service Commission appears at Appendix F to the application and was mailed on June 24, 2003.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The Pennsylvania Supreme Court, the highest state court in Pennsylvania, denied discretionary review on November 24, 2004. Appendix A.

The United States Supreme Court granted an extension of time until April 23, 2005, to file a Petition for a Writ of Certiorari on February 11, 2005. Appendix B.

Review of the April 1, 2004 decision of the Commonwealth Court of Pennsylvania is requested. Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, sec. 2, cl. 1. (Appendix G at A-15)

U.S. Const. amend XIV, sec.1. (Appendix H at A-16)

28 U.S.C.A. sec. 1257(a). (Appendix I at A-17)

42 U.S.C.A. sec. 2000e-2(h). (Appendix J at A-18)

PA. STAT. ANN. tit. 71, sec. 741.905a. (Appendix K at A-25)

PA. STAT. ANN. tit. 71, sec. 741.951(b). (Appendix K at A-25)

STATEMENT OF THE CASE

Procedural History

Petitioner is a female Attorney Examiner I employed by the Workers' Compensation Office of Adjudication, Department of Labor and Industry, Commonwealth of Pennsylvania. She filed a complaint with the Pennsylvania State Civil Service Commission alleging gender discrimination in its promotion practices to the position of Workers' Compensation Judge in violation of 71 P.S. sec. 741.951(b). The filing of the complaint raised the federal question sought to be reviewed by this Court. The Pennsylvania State Civil Service Commission after reviewing the complaint granted a hearing on the merits set for May 7, 2003. The hearing was postponed after Respondent, Department of Labor and Industry, filed a Motion to Dismiss, but not before the Commission received Petitioner's Pre-Hearing Conference Memorandum listing her witnesses and the evidence she planned to produce at the hearing. The Commission issued a decision on June 24, 2003 granting the Motion to Dismiss finding Petitioner lacked standing to contest her non-promotion because she was not within the "rule of three" on the employment list certified.

Petitioner requested reconsideration by the Commission which was denied on July 17, 2003.

Petitioner appealed to the Commonwealth Court of Pennsylvania which affirmed the decision of the Commission in a decision filed April 1, 2004. The Commonwealth Court of Pennsylvania further found Petitioner's appeal was frivolous and charged her attorney's fees and costs for the Indispensable Party in an Order dated May 4, 2004.

Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania which was denied on November 24, 2004.

Petitioner filed an Application for a Stay of Remand of Record Pending United States Supreme Court Review Pursuant to Pa.R.A.P. 2572 with the Supreme Court of Pennsylvania which was denied on December 29, 2004.

Petitioner filed an Application to Extend the Time to File a Writ of Certiorari until April 23, 2005 with this Court on February 7, 2005 which was granted on February 11, 2005.

On February 14, 2005 Indispensable Party filed a Praecipe to Transfer Judgment, February Term 2005, No. 1002, in the Court of Common Pleas for Philadelphia County in Pennsylvania.

On February 28, 2005 Petitioner filed an Application for Stay or Injunction Pending United States Supreme Court Review Pursuant to Pa.R.A.P. 1781 with the Commonwealth Court of Pennsylvania which was denied on March 3, 2005.

On March 15, 2005 the Indispensable Party sent Petitioner Interrogatories in Aid of Execution of the Judgment for attorney fees and costs.

Petitioner now files a writ of certiorari with this Court.

Facts:

Respondent employs a scheme to promote male civil service employees within the class of Attorney Examiner with test scores of 75 or below which has a disproportionate impact on female Attorney Examiner promotion candidates with the same score. Females are only selected by the Respondent from the employment list (71 P.S. sec. 3(n); Appendix K at A-19) and only those with the highest scores are interviewed or hired. The scheme employed by the Department of Labor & Industry to promote only males, despite the fact that they possessed low test scores, was effectuated by use of the civil service regulations that permit the hiring authority to chose what list to use to fill a position. 71 P.S. sec. 741.501 (Appendix K at A-22); 71 P.S. sec. 741.601 (Appendix at A-24); 71 P.S. sec. 741.602 (Appendix K at A-24 and A-25)

The class of Attorney Examiner in the Workers' Compensation Office of Adjudication consisted of only three individuals, two males and one female. All three Attorney Examiners were told when hired in 1996 that they were in training to be Workers' Compensation Judges and would be promoted. Both male Attorney Examiners were promoted. In both instances the promotion list was certified so that the individuals could be reached because they both had a score of 75 and the employment list contained individuals with higher test scores that would not allow the appointing authority to reach the male Attorney Examiners under the "rule of three"(71 P.S. sec. 741.602; Appendix K at A-24).

Respondents wish to preserve their right to choose between an employment list and a promotion list to fill open positions. It is the very presence of this discretion in the administration which acts as a "cloak" to allow gender discrimination to occur.

The State Civil Service Commission in its decision (Appendix F at A-13) refers only to a certified eligible list. It does not address petitioner's argument that three eligible lists are

certified for any open position: an employment list and two promotion lists; one is a state-wide list and one is for the department. Footnote 2 of the decision (Appendix F at A-13) does acknowledge that a vacant position can be filled from "an employment or promotion list". The Commission's determination that Petitioner lacks standing is incorrect. Standing has nothing to do with what list is employed. Petitioner's standing stems from the fact she is a civil service employee who is eligible for the position that is open. The Indispensable Party, Ms. Doneker, was not a civil service employee at the time the Allentown position was posted. The Commission is in fact narrowing standing by the list chosen to be used by the appointing authority. If the Department of Labor and Industry had decided to use the department promotion list or the state-wide promotion list Ms. Doneker's name would not have appeared and, in fact, Petitioner would have been among the top three candidates on both lists. The Commission has thus created a situation where the issue is now one that is recurring and will always evade ordinary review by its very essence.[3] The fact the male Attorney Examiners have been promoted with scores lower than the present Indispensable Party is proof in fact. Someone who is promoted using the promotion list with a score lower than the top three on the employment list is not aggrieved and is the only person who would have standing under the Commission's analysis. Conversely, according to the Commission's analysis, no female candidate in the top three on the employment list would have standing to challenge the promotion of males with lower scores when the promotion list is chosen to be used. Here, the same complaining party will be subject to the same action again.[4] Each time there is a vacancy for a position as a Workers' Compensation Judge the Department of Labor and Industry will have the opportunity to make a decision to use the employment list instead of the promotion list. Each time the Department of Labor and Industry chooses to use the employment list instead of the promotion list they will avoid the Petitioner and Petitioner will be aggrieved. Petitioner believes the current set of

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[3] Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

[4] Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed. 2d 350 (1975).

facts best demonstrates the Department of Labor and Industry's intent to avoid the Petitioner.

The Commonwealth Court's assertion that Petitioner ignores the law concerning the "rule of three" is illogical. (Commonwealth Court Decision dated April 1, 2004; Appendix C at A-8) The Department of Labor and Industry knew Petitioner was within the "rule of three" on the promotion lists because she was interviewed for the same position in Allentown on December 13, 2001 using the same 2001 Judges' test list used to hire Ms. Doneker. Male Attorney Examiner Marc Harrison was promoted to the Allentown position using the department promotion list. One year later he transferred back to the Philadelphia office leaving the Allentown position again vacant.

The Commonwealth Court decision states Petitioner was granted a hearing on February 27, 2003. (Appendix C at A-4) This is misleading because Petitioner was not afforded a hearing on the merits. A hearing date was set for May 7, 2003 but the Commission unconstitutionally cancelled the hearing on April 29, 2003 stating the Motion to Dismiss may resolve the issue and failed to rule on Petitioner's Objections and Motion to Vacate.

The Commonwealth Court ignored Petitioner's constitutional argument as did the Commission. The fact that the Indispensable Party, Beverly Doneker, is a woman, does not cure the fact that she was not a civil service employee or that she was being hired and not promoted. The Commonwealth Court stated that it was difficult to relate Petitioner's arguments to the Commission's Order. (Appendix C at A-6) That is because the Commonwealth Court refused to accept the basic premise of Petitioner's argument that the Commission had ignored her argument. It is obvious the Commonwealth Court has failed to review the underlying documents that constitute the record before the State Civil Service Commission. Both the Commission's Order and the Opinion of the Commonwealth Court fail to acknowledge that there is more than one list available and that someone is making a choice as to which list to use. Petitioner was in the top three on the promotion lists certified at the same time the

employment list used to hire the Indispensable Party was certified. The Department of Labor and Industry made a choice use the employment list and avoid Petitioner.

It is only because the Commonwealth Court has ignored the Petitioner's argument that it finds it has no basis in fact. As there has been no hearing, Petitioner has been precluded from presenting any evidence that would have been subpoenaed to support her claims. To find the Petitioner's argument frivolous and lacking in merit is to add insult to injury. To charge Petitioner attorney fees and costs for the Indispensable Party who was never going to lose her position, is criminal.

Finally, the list relied upon as evidence by Respondent in its Motion to Dismiss has been found to be defective by the State Civil Service Commission itself in its decision rendered November 17, 2004, Sharon Zanotto v. State Civil Service Commission. (Appendix M at A-28) Therefore, no facts have been established in this case to even support Respondent's Motion to Dismiss.

Petitioner examination grade and length of service is equal to the two male Attorney Examiners who were promoted when the Commonwealth chose to use the promotion list. The only difference is gender.

Arguments:

I. WHETHER PETITIONER HAS STANDING UNDER ARTICLE III TO CHALLENGE HER NON-PROMOTION IN THE PENNSYLVANIA STATE CIVIL SERVICE DUE TO GENDER DISCRIMINATION.

Issues of standing may arise for the first time in the Supreme Court.[5] Respondent's holding that Petitioner does not have standing is in contravention of precedent in the Commonwealth of Pennsylvania that requires that Petitioner only be an employee in the Appointing Authority's Department to have standing, Magnelli v. Commonwealth, Pennsylvania State Civil Service Commission, 55 Pa.Commw 531, 423 A.2d 802, 804 (Commw. Ct.), aff'd 498 Pa. 361, 446 A.2d 600 (Sup. Ct. 1908). In Cunningham v. City of Philadelphia, 148 L.R.R.M. 2421 (E.D. Pa. 1995), Magnelli, supra. is cited to find standing where plaintiffs were civil service employees and were on the promotion list but were not at the top of the list and were not eligible for promotion at that time. The Federal District Court found standing existed because, "...Plaintiffs' prospects for future promotion will be directly affected by the manner in which the City interprets and applies the civil service

[5] Bender v. Williamsport School District, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

regulations...." Cunningham, supra. at 2425. The Commonwealth Court of Pennsylvania in Ambron v. Philadelphia Civil Service Commission, 73 Pa. Commw. 628, 458 A.2d 1055 (1983) expanded the holding in Magnelli, supra. by allowing civil service employees who had resigned to have standing based on the mere possibility of future reinstatement. The State Civil Service Commission's (hereinafter "SCSC") original decision to grant Petitioner a hearing on the merits was the correct determination. The Commission's failure to support their decision with any reasoning supported by precedent from the Commonwealth of Pennsylvania, or any other court, to deny Petitioner standing and an opportunity to present her case results in a denial of Petitioner's Equal Protection and Due Process rights.

Article III of the United States Constitution requires an injury in fact, causation and a likelihood that the relief requested will redress the alleged injury.[6] Petitioner meets the requirements for Article III standing as follows: Her injury in fact is that she was not considered for a promised promotion when both male Attorney Examiners were promoted as promised. Her injury was caused by Respondent not choosing to use the promotion list to re-fill the Allentown position in February 2003, and many subsequent open positions. Petitioner was in the top three on

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[6] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04, 118 S.Ct. 1003, 140 L. Ed. 2d 210 (1998).

the promotion list and was able to be considered for promotion in compliance with 71 P.S. Section 602. Petitioner is prevented from being considered for promotion due to the unconstitutional use of 71 P.S. Section 741.601 by Respondent. The Respondent's choice to use either of the promotion lists or the employment list is a barrier being used to make it more difficult for one group to obtain a benefit than it is for a member of another group.

> "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit...."
> Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993).

The discriminatory personnel action was complete when the appointing authority decided not to use a

promotion list. When the decision was made to use the employment list, Petitioner had been avoided and rejected. Petitioner was in the top three on both the state-wide and department promotion lists. The Respondent's argument that the highest test score is the most qualified candidate is a mere pretext to avoid Petitioner.[7] The decision has an exclusionary effect in the case of female promotion candidates. The highest test score is not necessarily an indicator of successful job performance. Civil Service is suppose to reward meritorious service. The goals outlined in 71 P.S. sec. 741.2 of the Civil Service Act are greater efficiency and economy in the administration of the Commonwealth. The practice results in all females being required to have a high score on a test to be hired or promoted, but allows males to be promoted with low scores. So that despite the fact that a female was hired for the position, instead of Petitioner being promoted, the result is still gender discrimination.

The State Civil Service Commission has chosen to refuse to consider "comparables" to prove gender discrimination due to disparate treatment, even though it is required to be set out in the initial appeal for a hearing.[8] Instead, Respondent has created a situation where the

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[7] Neither male Attorney Examiner was in the top three on the employment lists certified at the time of their respective promotions.

[8] Civil Service Regulation Section 105.12(c).

comparison for purposes of discrimination begins after Respondent has made the choice as to which list it will use to fill a position. This is merely an attempt to obviate any evidence Petitioner offered to produce demonstrating discrimination. Petitioner and one male Attorney Examiner, Marc Harrison, had the same immediate supervisor, Judge Manager Thomas Hines. All three Attorney Examiners achieved the same grade on the test; and had the same length of service. Petitioner's immediate supervisor did not provide Petitioner with the same job duties as the male Attorney Examiner also under his supervision.

Petitioner's injury can be redressed by this court by finding that Zanotto v. SCSC acknowledged a technical violation of the Act which is discrimination per se under Pennsylvania law. Respondent would then be required to provide Petitioner with the next available position.[9]. Petitioner's injury could also be redressed by ordering the Pennsylvania State Civil Service Commission to provide Petitioner a hearing on the merits of her claim of discrimination under Section 951(b) of the Act. Finally, this court could grant certiorari and consider adopting the holding in Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992) as an alternative fourth prong to the prima facie case requirements under the McDonnell Douglas/Burdine to

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[9] Pronko v. Commonwealth of Pennsylvania (Department of Revenue), 114 Pa.Commw. 428, 539 A.2d 456 (1988).

achieve uniformity among the Circuits. Currently, Mitchell, supra. is never cited by the Third, Eighth and Tenth Circuits to allow the establishment of the prima facie burden in discrimination where disparate treatment exists. The State Civil Service Commission predicated its present decision on the fact that Petitioner was not within the rule of three on the employment list and found her past employment in the civil service irrelevant to deny her standing to contest her non-promotion. An adoption of the Mitchell, supra. case would preclude this result.

II. WHETHER, WHEN THERE IS A CHALLENGE OF GENDER DISCRIMINATION UNDER 71 P.S. sec. 741.951(b) IN AN EMPLOYMENT PRACTICE ENUMERATED UNDER 71 P.S. sec. 741.905a, RESPONDENT HAS DISCRETION TO DENY A HEARING ON THE MERITS.

The current decision of the Pennsylvania State Civil Service Commission ignores Petitioner's complaint of gender discrimination in the appointing authority's promotion practices. Petitioner alleges that the actions of the appointing authority are a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e)-2(h), and thus are a violation of the United States Constitution's Equal Protection and Due Process Clauses.

> "The standard of review under equal protection rationality analysis... is governed by federal constitutional law, and a state court's application of that standard is fully reviewable in this Court on writ of certiorari." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659, rehearing denied 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222, on remand 304 N.W.2d 915 (Minn. 1981).

In a law review article titled "An Examination of Discrimination Under The Pennsylvania Civil Service Act", author Debra Punsky Rand suggests that Pennsylvania's application of Title VII law to the State Civil Service Act is unique. Rand, *An Examination of Discrimination Under the Pennsylvania Civil Service Act*, 25 Duq. L. Rev. 209 (1987).

II(a). WHETHER PETITIONER MET HER PRIMA FACIE BURDEN UNDER THE McDONALD DOUGLAS/BURDINE TEST AND IN THE ALTERNATIVE UNDER MITCHELL v. TOLEDO HOSPITAL, 964 F.2D 577 (6TH Cir. 1992).

71 P.S. Section 741.905(a) prohibits discrimination in promotion. Com. Dept. of Health v. Nwogwugwu, 141 Pa. Cmwlth. 33, 594 A.2d 847 (1991) holds that the standard of proof where discrimination is alleged requires complainant

to make out a prima facie case of discrimination citing the test to be used as a modified version of the standard of proof developed by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). Petitioner in her complaint to the State Civil Service Commission presented facts sufficient to meet the burden of proof for a prima facie case under the McDonnell Douglas/Burdine, criteria as follows: (i) she is of the female gender classification; (ii) she provided proof that she bid on the job through jobnet, the internal job application system, and was qualified for the position. A fortiori. Petitioner had applied for the same opening the year before and received a letter from the Adjudication Director stating she was qualified.; (iii) despite Petitioner's bid and qualifications, Respondent choose not to use a promotion list to fill the job vacancy. Respondent instead choose to use the employment list to avoid Petitioner; (iv) An outside hire was interviewed and hired who had a test score higher than Petitioner but did not have experience conducting hearings, was significantly younger than Petitioner, and had less years of experience as an attorney than Petitioner.

It is this fourth prong of the McDonnell Douglass/Burdine test that is disputed among the Circuit Courts. Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992) is never cited by the Third, Eighth or Tenth Circuits. It permits an alternative prong to the McDonnell Douglas/Burdine prima facie case where the first three elements have been proven to show disparate treatment. A

plaintiff must produce evidence that establishes at a minimum that a "comparable non-protected person was treated better". The comparables must be similarly situated in all respects i.e. the same supervisor and subject to the same standards. This, Petitioner has presented. Attached to the Notice of Public Hearing issued by the SCSC on March 27, 2003 were Excerpts from Rules of the Civil Service Commission and Regulations of the Executive Director of Civil Service, Chapter 105 - Notice and Hearing, Section 105.12(c)(2) which requires Petitioner to allege how treatment differs from treatment of others similarly situated as part of her complaint to qualify for a hearing on the merits.

> "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices ...."
> McDonnell Douglas Corp. v. Green,
> 411 U.S. 792, 800, 93 S.Ct. 1817,
> 36 L. Ed. 2d 668 (1973).

> "What is required by Congress the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible

classification. Id. at 801.

III(b). WHETHER RESPONDENT'S CHOICE TO USE THE "EMPLOYMENT" LIST INSTEAD OF THE "PROMOTION" LIST WAS EVIDENCE OF INTENTIONAL DISCRIMINATION AGAINST PETITIONER ON THE BASIS OF GENDER TO DENY HER PROMOTION IN THE PENNSYLVANIA STATE CIVIL SERVICE.

Petitioner belongs to the civil service classification of Attorney Examiner. Three Attorney Examiners were hired in 1996 to rectify the backlog of cases as ordered by Eck v. Wofford, No. 86 Civ. 1780 (M.D. Pa. 1995): two males and one female. Petitioner alleges the use of the employment list alleging the non-discriminatory reason of high grades equals most qualified is a pretext to avoid her. Respondent is and has in the past engaged in disparate treatment based on gender. Petitioner was never afforded the same employment opportunities as either male Attorney Examiner.

Pronko v. Commonwealth of PA (Dept. Of Rev.), 114 Pa.Commw. 428, 539 A.2d 456 (1988) provides that a regular status employee's only avenue is via 71 P.S. sec. 951(b) of the Act where the personnel action is for other than removal, suspension, demotion or furlough. The fact that there is a technical violation does not change the fact that the claim must be analyzed in the context of a discrimination

claim.

Petitioner argues that the choice of the appointing authority to use the employment list instead of the promotion list demonstrates intent to discriminate against Petitioner. The fact that Petitioner was within the rule of three on the promotion list when she interviewed for the Allentown position on December 13, 2001 proves that she would have been within the rule of three if the promotion list was used to fill the Allentown position in February 2003.

In dicta, Pronko, supra. at 18 states, "...the Act's purpose, promoting the making of unbiased personnel decisions based upon job-related criteria, would not be furthered were we to permit a mistake which causes a deserving employee to be passed over for promotion to go unrectified."

Here there is not only a technical violation of the Act, but Petitioner has demonstrated an intent to discriminate on the part of the Appointing Authority in addition to presenting a prima facie case of discrimination under the McDonnell Douglas/Burdine analysis yet Petitioner was not even afforded a hearing. The evidence upon which Respondent's Motion to Dismiss is based has been found to be defective by Respondent itself. Petitioner should at least be afforded the opportunity to cross-examine not only the person who requested the list, but the person who prepared the list and the candidates on the list.

II(c). WHETHER THE RESPONDENT'S FINDING IN ZANOTTO V. SCSC, (Appeal No. 24004) OF A TECHNICAL ERROR IN THE ELIGIBLE LIST IS EQUIVALENT TO DISCRIMINATION PER SE AND ENTITLES PETITIONER TO THE NEXT AVAILABLE POSITION.

The integrity of the Respondent's evidence supporting its Motion to Dismiss has been called into question by the Civil Service Commission's own ruling in the case of Sharon Zanotto v. SCSC (Appeal No. 24004). The SCSC confirmed that the list employed to hire the Indispensable Party, Beverly Doneker, contained ineligibles. There is no evidence by the Respondent in the case in chief to show that the list was properly purged. Petitioner was merely provided a redacted copy of the employment list attached to Respondent's Motion to Dismiss. Evidence produced at the hearing on Zanotto v. SCSC demonstrated that 133 people were on the eligible list as of August 30, 2004. As of September 16, 2004 the list only included 88 eligibles. Those eliminated from the list were ineligibles and those eliminated due to a purging of the list. Purging eliminated those that did not take the test but were carried over from the previous test. A current Workers' Compensation Judge explained to Petitioner that candidates with high scores knew not to re-take the test because the list was never purged in compliance with the Act and this way candidates did not risk getting a lower score on a harder subsequent test. No evidence was produced by Respondent

that the employment list from which Beverly Doneker was hired had been properly purged prior to her hire so that it did not contain ineligibles or eligibles from the prior list that did not re-take the test in 2001.

III. WHETHER PETITIONER'S APPEAL TO THE COMMONWEALTH COURT OF PENNSYLVANIA WAS FRIVOLOUS AND WARRANTED AN AWARD OF ATTORNEY'S FEES AND COSTS FOR THE INDISPENSABLE PARTY.

Petitioner's appeal to the Commonwealth Court of Pennsylvania was not frivolous. In Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2d 648, 656 (1978) the court explained that, "...the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case...". The Court goes on to explain:

> "...it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success..."

Christiansburg, supra. at 700.

Coates v. Bechtel, 811 F.2d 1045 (7th Cir. 1987) which relied on Christiansburg, supra. for authority, held the merits of the underlying litigation were critical to a determination as to whether costs and counsel fees awarded were unwarranted. In Coates, supra. summary judgment was granted to the defendant and fees and costs awarded to the Defendant. On appeal the 7th Circuit found the district court abused its discretion in making the award after it reviewed the factual background of the litigation. Coates, supra. was a civil rights action filed under 42 U.S.C. sec. 1988 alleging discrimination. The Court explained:

> "If prevailing defendants were routinely awarded attorney's fees under Section 1988, civil rights plaintiffs would be extremely reluctant to initiate litigation for fear of being charged with a fee award vastly exceeding the expected recovery, and in some case their ability to pay, thereby vitiating the underlying purpose of Section 1988. See Vandenplas, 797 F.2d at 429, 432; Hershinow, 772 F.2d at 395 (emphasizing the chilling effect large awards would have on plaintiffs); S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinting in 1976 U.S. Code Cong. & Admin. News 5908, 5912 (civil rights plaintiffs should not be deterred 'from bringing good faith actions

to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose')." Coates, supra. at 1049.

The court in Coates, supra. at 1051 concluded that when determining whether or not a claim is frivolous the court must determine what information was available to the plaintiff at the time the lawsuit was initiated; not whether the claim is ultimately proved to be without merit.

Petitioner's case is analogous to Coates, supra. in that she is asserting her constitutional rights and was precluded from obtaining evidence to prove her case. The State Civil Service Commission and the Department of Labor and Industry are in control of the evidence. If it was other than what is asserted by Petitioner, the Commonwealth would have readily produced, and flatly proven the Petitioner wrong. As they are unable to do this, they instead make it uncomfortable to pursue the litigation further by making it financially infeasible for Petitioner to pursue her rights, which is itself a violation of her rights.

IV WHETHER RESPONDENT VIOLATED PETITIONER'S CONSTITUIONAL DUE PROCESS RIGHTS.

Respondent did not conduct proceedings in compliance with Constitutional Due Process. U.S. Const. amend. XIV, sec. 1. The rules of evidence are relaxed in administrative proceedings.[10] Petitioner was told she could obtain her subpoenas at the pre-hearing conference scheduled for May 1, 2003. After she filed her pre-hearing memorandum on April 25, 2003, the Pre-Hearing Conference was cancelled. Petitioner was denied the right to obtain subpoenas because she was told the hearing scheduled for May 7, 2003 was continued because the Motion to Dismiss could resolve the issue. Petitioner was precluded from obtaining discovery that is in the hands of Respondent held by both the appointing authority and the SCSC. The redacted list submitted as evidence to support the Appointing Authority's Motion to Dismiss is a hearsay document. Petitioner was not afforded the opportunity to cross-examine the person who certified the list to see if the list had been properly purged, and when that had been accomplished as required by 71 P.S. Section 741.507. Further, Petitioner was unable to question the candidates on the list, including the Indispensable Party, to see if they had actually taken the test in 2001 and were qualified to take the test on the date it was administered. Petitioner was precluded from cross-

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[10] 2 Pa.C.S.A. Sections 505 and 554.

examining the appointing authority representative, Matt Stine, (See Appointing Authority's Motion to Dismiss at page 2, paragraph 2) who requested the civil service lists for purposes of filling the vacant position. No affidavit of Matt Stine was submitted with the Motion to Dismiss to support this allegation. The SCSC ignored Petitioner's assertion that for each job vacancy more than one list is certified. The promotion lists certified for the position were not produced as evidence nor was Petitioner permitted to cross-examine the person who requests the lists for the position.

The record certified by the SCSC to the Commonwealth Court failed to include Appellant's Preservation of Objections to Procedures Before the Civil Service Commission, any of the Pre-Hearing Conference Memorandums that indicated the evidence to be presented by each of the parties at the hearing originally scheduled for May 7, 2003. The SCSC never ruled on objections filed as to the procedures before the SCSC. Nor did it rule on objections to Appointing Authority's Pre-Hearing Conference memorandum. Petitioner filed a Supplemental Reproduced Record with the Commonwealth Court to complete the record to be reviewed. The Commonwealth Court in its decision filed April 1, 2004 ruled in footnote 7 (Appendix C at A-7) that Petitioner waived any issues concerning the Commission's abuse of its power due to the fact that it was not listed as an issue in her statement of questions. Even though the Commonwealth Court refused to consider the issue, Petitioner properly preserved the issue to

be reviewed by the Court by filing with the Commonwealth Court the Supplemental Reproduced Record, outlining in the Statement of the Case under the procedural history the complained of actions of the Commission and under the Argument stated the issue quite plainly as "Whether actions by the Civil Service Commission constitute an abuse of power in adjudicating the Complaint of Petitioner." and "Whether Respondent violated Petitioner's constitutional rights by failing to provide Petitioner ten (10)days to respond to Respondent's Motion to Dismiss." In Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania she listed the issue in her Questions Presented for Review as "Whether Appellant waived her constitutional objections to the procedures of the Civil Service Commission." The Supreme Court denied Petitioner's Petition for Allowance of Appeal.

The Pennsylvania Rule of Professional Conduct 3.3 requires candor toward a tribunal. It specifically forbids an attorney to "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;" Pa. R. Prof. Con. 3.3(a)(2). The Respondent is both adjudicator and opponent.1

---

[1] "There has been, however, a tendency in the decisional law in which the issue is one of a fair tribunal to give precedential value to prior decisional law in which the sole issue or controlling issue concerned the commingling of functions of staff personnel of an administrative agency, an

Respondent is also the state and is automatically granted a presumption and deference with regard to official acts. This presumption should not be abused especially in instances where the Respondent is both adjudicator and opponent. As most Petitioners are pro se before the SCSC any motion that could end the litigation such as a Motion to Dismiss should have been served on Petitioner by the Commission with a Notice stating when the response was constitutionally due and outlining Petitioner's rights to discovery to refute the Motion. Instead, Petitioner was called at her home and told to get in a response ASAP. On the same date Respondent

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issue which basically relates to a fair trial rather than a fair tribunal. Of course, it cannot be gainsaid that the end product of the want of a fair tribunal is an unfair trial nor that the want of a fair trial regardless of the impartiality of the tribunal must be condemned; but in our search for even justice before administrative adjudicatory agencies, these two concepts must be delineated in defining the elements of a fair trial and the criteria of a fair tribunal.

Turning first to the role played here by the Board it must be noted that a not insignificant number of our State administrative agencies, The Dental Board included, are authorized under their operative statutes to investigate possible violations of the law, to act as complainant in enforcement proceedings and to adjudicate enforcement proceedings, including those initiated by the agency as complainant." Bruteyn v. State Dental Council & Exam Bd., 32 Pa.Cmwlth. 541, 380 A.2d 497 (1977).

issued a pre-hearing conference notice and requirements for filing a memorandum outlining the evidence Petitioner planned to present. She was told she could obtain subpoenas for the May 7th hearing at the pre-hearing conference scheduled for May 1st.

Petitioner in paragraph two of her response to Respondent's Motion to Dismiss, stated that she was not afforded the opportunity to cross-examine the averments made in paragraph two of the Motion to Dismiss. Pennsylvania Rule of Evidence 201(e) provides that a party is "entitled" upon timely request to an opportunity to be heard as to the propriety of taking judicial notice. Petitioner was never afforded the opportunity to cross-examine Matt Stine to ascertain what he requested and what he actually received from the Civil Service Commission. Respondent failed to attach any sworn affidavit from Mr. Stine supporting the allegations made in Paragraph two. Petitioner asserts that Matt Stine not only received an employment list but two promotion lists as well and that Petitioner was within the Rule of Three on both promotion lists thus providing the appointing authority the opportunity to make a decision and discriminate against the Petitioner on the basis of gender. Petitioner's response to the Defendant's Motion to Dismiss has properly preserved the issue for review by this Court.

REASONS FOR GRANTING THE PETITION

The greatest good that can be achieved by granting a writ of certiorari in this case is to keep government honest in its dealings with the public and its own employees. There is no room for secrecy when advocating fairness. Legitimate policies and standards do not need a "cloak". There is no important government objective in utilizing a promotion list and promoting male Attorney Examiners with only a grade of 75 but requiring female Attorney Examiners to compete with those on the employment list and have a competitive grade of 90 or above to be considered for promotion.

This case is important because it involves state action. The State if the form of not only the Workers' Compensation Office of Adjudication, but the Department of Labor and Industry, the Civil Service Commission, the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, are all charged with the duty to uphold the Constitution. If they are permitted within their own systems to encourage and support gender discrimination, at any level, how can they fairly administer and rule on constitutional questions concerning the public. I believe this Court needs to examine the methods employed in this case with the pro se Petitioner in mind. Most individuals appearing before the Civil Service Commission are pro se. Many in Workers' Compensation cases are pro se and almost all in Unemployment Compensation cases are necessarily pro se. The protections of due process and equal protection are for all citizens. Civil Service advancement is supposed to be based on merit, not on whether or not you are a "player". If the appointing authority, the Department of Labor and Industry, is willing to sanction gender discrimination in its own promotion practices how can it police it properly in Workers' Compensation and Unemployment Compensation or any other administrative agency under its jurisdiction.

The second good this Court could achieve by granting certiorari in this case is to use it to provide a uniform rule to prove gender discrimination by adopting the alternate fourth prong to the McDonnell Douglas/Burdine test set out in Mitchell v. Toledo

Hospital, supra. Currently the Third, Eighth and Tenth Circuits do not cite to the case. Section 105.12(c) of the Civil Service Regulations requires the initial appeal alleging discrimination to set out the elements outlined in Mitchell, supra. to obtain a hearing. Adopting the criteria would preclude a situation such as the one Petitioner now stands in where promotion and not initial hiring is the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

In the alternative Petitioner requests this Court to summarily dispose of the matters presented on the merits, in accordance with Supreme Court Rule 16.1, and:

(1) order the State Civil Service Commission to appoint Petitioner to the next available position based upon the technical error confirmed by the Commission in Zanotto v. SCSC; or

(2) order the State Civil Service Commission to provide Petitioner with the opportunity to be heard on the issue of gender discrimination in her non-promotion.

Respectfully submitted,

Mary Catherine Baur

Mary Catherine Baur, Petitioner, Pro Se

Date: April 23, 2005

(2)

Supreme Court, U.S.
FILED

AND BRIEFS

No. 041426 APR 23 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Mary Catherine Baur,

Petitioner

v.

Pennsylvania State Civil Service Commission
(Department of Labor & Industry),

Respondent(s)

Appendix to
Petition For Writ Of Certiorari
To The Commonwealth Court of Pennsylvania

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Mary Catherine Baur
700 Mollbore Terrace
Philadelphia, PA 19148-5034
(215) 389-4471

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARY CATHERINE BAUR,	:	No. 196 EAL 2004
	:	
Petitioner	:	
	:	Petition for Allowance of
	:	Appeal from the Order of
v.	:	the Commonwealth Court
	:	
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF LABOR AND INDUSTRY),	:	
	:	
	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 24th day of November, 2004, the Petition for Allowance of Appeal is **DENIED.**

(Seal)
TRUE COPY FROM RECORD

Attest: November 24, 2004

/s/
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania
Eastern District

Appendix A

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 11, 2005

Ms. Mary Catherine Baur
700 Mollbore Terrace
Philadelphia, PA 19148-5034

Re: Mary Catherine Baur
v. State Civil Service Commission
(Department of Labor and Industry)
Application No. 04A694

Dear Ms. Baur:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on February 11, 2005 extended the time to and including April 23, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by
/s/
Heather Trant
Case Analyst

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Catherine Baur, Petitioner :

v. :

State Civil Service Commission (Department of Labor and Industry), : No. 1613 C.D. 2003 : Submitted: February 20, 2004

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 1, 2004

Mary Catherine Baur (Baur) petitions for review of the order of the Pennsylvania State Civil Service Commission (Commission) that granted the Pennsylvania Department of Labor and Industry's (Department) motion to dismiss Baur's challenge to her non-selection for promotion to a position as a Workers' Compensation Judge (WCJ) in Allentown, Pennsylvania.

On December 9, 2002, the Commission certified Employment List Number 19290 to the Department for the WCJ position in Allentown. The top three examination scores on the list were 105, 100, and 90. Nine individuals including Beverly Doneker (Doneker)[1] obtained a score of 90 or above. Baur scored a 75. On February 10, 2003, the Department appointed Doneker to the position.

On February 2, 2003, Baur appealed her non-selection to the Commission. She alleged that her non-selection was the result of

---

[1] Doneker is an indispensable party to this action.

discrimination on the basis of political opinions/affiliations, age, sex, violation of Civil Service Act/Rules, and other non-merit factors. On February 27, 2003, the Commission granted Baur a hearing pursuant to Section 951(b) of the Civil Service Act (Act)[2], 71 P.S. Section 741.951(b). Doneker requested that she participate as a party by letter dated March 12, 2003.

On April 18, 2003, the Department moved to dismiss and alleged that because Baur did not achieve one of the three highest scores on the examination and, in fact, was sixteenth on a list of twenty-two candidates, she was not eligible for selection to the position of Workers' Compensation Judge under the "Rule of Three" set forth in Section 601 of the Act, 71 P.S. Section 741.601.[3] Because Baur was not eligible for selection to Workers' Compensation Judge in Allentown pursuant to Section 601, the Department asserted that it was not permitted to appoint her to that position. The Department also asserted that it acted legitimately and in a non-discriminatory manner.[4]

---

[2] Act of August 5, 1941, P.L. 752, *as amended*. This Section was added by the Act of August 27, 1963, P.L. 1257.

[3] Section 601 of the Act provides in pertinent part:

> Whenever a vacancy is likely to occur or is to be filled in the classified service, the appointing authority shall submit to the director a statement indicating the position to be filled. Unless the appointing authority elects to follow one of the alternative procedures provided for in this act, or unless there is in existence a labor agreement covering promotions in the classified service, in which case the terms and procedures of such labor agreement relative to the procedures for promotions shall be controlling, the director shall certify to the appointing authority the names of the three eligibles who are highest on the appropriate promotion list or employment list, whichever is in existence, or from the one, which under the rules of the commission, has priority.

[4] Doneker indicated by letter that she joined the motion.

BEST AVAILA

By order mailed June 24, 2003, the Commission granted the motion and dismissed Baur's appeal:

> [T]he documents attached to the appointing authority's motio include Exhibit 2, the State Civil Service Commissio Certification of Eligibles' List, which was issued on Decemb 9, 2002, and that was used to select the successful candidate fo the contested position. The Commission may take offici notice of this list since the selection of Ms. Doneker was lat audited and approved by the Commission and a copy of thi certification list is, therefore, also found in the Commission' own files.... This certification list plainly establishes tha appellant's [Baur] score '75' was such that she could not hav been selected for this position as a matter of law, since she wa not included within the group of candidates who were availabl to be considered within the rule of three....
>
> Since appellant [Baur] was not, as a matter of law, in actua competition with Ms. Doneker for selection to this position, sh lacks standing to challenge her non-selection on the basis of a claim of discrimination. She is simply not a 'person who i aggrieved' within the meaning of Section 951(b) of the Act, 7 P.S. Section 741.951(b). Accordingly, this appeal is properly dismissed and the record closed in this matter. (Footnote and citations omitted).

State Civil Service Commission Order, June 24, 2003, at 1-2. On July 17, 2003, the Commission denied Baur's motion to vacate the June 24, 2003, order.

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Baur contends[5] that the failure to appoint her as a WCJ violated Section 951(b) of the Act, 71 P.S. Section 951(b). Baur asserts that the Allentown list from December 2001, indicated that Attorney Examiner Mark Harrison had a score of 75 or lower but was promoted and transferred to the Philadelphia Office where he could not initially be promoted "because there would have been too many complaints filed to contest, based upon his score." Baur's Brief at 11. Baur argues that the Department has perpetuated the discriminatory practice of promoting male attorney examiners but not promoting female attorney examiners.[6]

Baur also argues that she is aggrieved because the position was first posted on Jobnet, an internal bidding procedure of the Commonwealth and neither Doneker nor T.W. Knox, who scored 100 on the test, were Commonwealth employees at the time.

It is difficult to relate, exactly, Baur's arguments to the Commission's order. The Commission dismissed the appeal because Baur's test score was not high enough to qualify for consideration. Her score was not one of the three highest scores. Section 602 of the Act, 71 P.S. Section 741.602, provides in pertinent part: "If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the highest ranking available persons on the certification of eligibles."

In addition, the Commission's regulation, 4 Pa.Code Section 97.11(a), provides:

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5 Our review is limited to determination of whether constitutional rights have been violated, error of law was committed, or necessary findings of fact were unsupported by substantial evidence. McGuire v. Department of Aging, 592 A.2d 830 (Pa.Cmwlth. 1991).

6 In the case before this Court, Doneker, the person appointed to the position is a woman.

Right of choice in making appointments and promotions. T rule -of-three applies when making selections fr employment and promotion lists. If the appropriate contains fewer than three eligibles, the Director may, up request of the appointing authority, certify candidates fr other appropriate lists to ensure the appointing authority has least three available eligibles from which to choose.

Here, it is undisputed that Baur's score did not rank among th top three examination scores, which were 90 or higher. Therefore, th Department could not have considered her for the position. The Commission did not err when it granted the Department's motion to dismiss.[7]

Doneker requests this Court award her attorneys' fees pursuan to Pa.R.A.P. 2744[8]. Doneker argues taht Baur's petition for review is frivolous because it has no basis in law or fact and does not present a justiciable question for review becaue the Rule of Three is a well settled principle of law and Baur does not argue that her score was on of the three highest.

---

[7] In the argument section of her brief, Baur argues that the Commission abused it power in adjudicating her complaint becaus she prepared for a hearing, prepared a pre-hearing conference memorandum, andprepared for a pre-hearing conference which were ultimately canceled, and that her constitutional rights were violated because she was not allowed ten days to respond to the motion to dismiss. Baur failed to set forth these issues in her statement of questions involved. Therefore, these issues are waived. Coraluzzi v. Commonwealth, 524 A.2d 540 (Pa. Cmwlth. 1987).

[8] Pa.R.A.P. 2744 provides in pertinent part:

"In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages a may be just, including (1) a reasonable counsel fee...if it determines that the appeal is frivolous...."

"An appeal that raises an issue that is well settled and presents no legal support is frivolous.... A brief that lacks support for an argument and citation to pertinent authority is grounds to find an appeal frivolous...." Venafro v. Department of Transportation, Bureau of Driver Licensing, 796 A.2d 384, 388 (Pa. Cmwlth. 2002).

Here, Baur ignores the well settled law regarding the Rule of Three and the fact that she did not score high enough on the test to be considered for the WCJ position. She does not present legal support for her argument. This Court agrees that Baur's appeal is frivolous and that Doneker is entitled to an award of attorney's fees.

Accordingly, this Court affirms and Doneker's request for the assessment of reasonable counsel fees against Baur is granted. Doneker is directed to file a bill of costs pursuant to Pa.R.A.P. 3751.[9]

BERNARD L. McGINLEY, Judge

Judge Simpson did not participate in the decision in this case.

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[9] Pa.R.A.P. 3751 provides:

> A party who desires costs to be taxed under Rule 2762(b) (procedure for collection of costs on appeal) shall state them in an itemized and verified bill of costs which such party shall file with the prothonotary within 14 days after entry of the judgment or other final order.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Catherine Baur, Petitioner	:	
v.	:	
State Civil Service Commission (Department of Labor and Industry), Respondent	:	No. 1613 C.D. 2003

ORDER

AND NOW, this 1st day of April 2004, the order of the State Civil Service Commission in the above captioned matter is affirmed. Beverly J. Doneker's request for the assessment of counsel fees against Mary Catherine Baur is granted. Beverly J. Doneker shall file a bill of costs pursuant to Pa.R.A.P. 3751.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Catherine Baur,	:	
Petitioner,	:	
v.	:	
	:	
State Civil Service Commission	:	
(Department of Labor and Industry),	:	No. 1613
Respondent.	:	C.D. 2003

ORDER

AND NOW, this 4th day of May, 2004, after review of the itemized bill of costs submitted by Indispensable Party, Beverly J. Doneker, by and through her attorneys, Tallman, Hudders & Sorrentino, P.C., this Court approves a total of $4,255.50 with cost of printing the brief of $49.00 and counsel fees of $4,206.50. The paralegal hourly rate contained in the bill of costs is reduced to $65.00. The paralegal total hours is reduced by .4 hours. The attorney total hours is reduced by 3.3 hours.

BERNARD L. McGINLEY, Judge

Certified from the Record
May 5, 2004
and Order Exit

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION
P.O. Box 569
Harrisburg, PA 17108-0569

July 17, 2003

(717)783-2924
FAX (717)772-5120

Ms. Mary Catherine Baur
914 Snyder Avenue
Apartment 1
Philadelphia, Pennsylvania 19148-2312

Re: Mary Catherine Baur v. Department of Labor and Industry
SCSC Appeal No. 23094

Dear Ms. Baur:

This is in response to your correspondence received July 9, 2003. The Commission, at its regular meeting of July 15, 2003, considered your request for reconsideration of your appeal. The Commission, after careful consideration, hereby denies your request and reaffirms its previous Order.

Sincerely,
/s/
Katherene E. Holtzinger Conner, Esquire
Chairman
MAILED: July 17, 2003
cc: Amy C. East, Esquire
Judith M. Gilroy, Esquire
Beverly J. Doneker, Indispensable Party
Aubrey Watkins

COMMONWEALTH OF PENNSYLVANIA

Mary C. Baur	:	State Civil Service Commission
	:	
v.	:	
	:	
Pennsylvania Department of Labor and Industry	:	Appeal No. 23094

Indispensable Party
Beverly J. Doneker

ORDER

AND NOW, the Pennsylvania State Civil Service Commission, having carefully reviewed the appointing authority's April 18, 2003 Motion to Dismiss, appellant's April 25, 2003 Response to Appellee's Motion to Dismiss, as well as the indispensable party's April 25, 2003 letter indicating that she joins in the Motion to Dismiss filed by the appointing authority, hereby grants the Motion.

Appellant's appeal seeks to challenge her non-selection for promotion to a position as a Workers' Compensation Judge in Allentown, Pennsylvania, a position that was filled by the selection of Beverly Doneker on February 10, 2003. However, the documents attached to the appointing authority's motion include Exhibit 2, the State Civil Service Commission Certification of Eligibles' List, which was issued on December 9, 2002, and that was

used to select the successful candidate for the contested position. The Commission may take official notice of this list since the selection of Ms. Doneker was later audited and approved by the Commission and a copy of this certification list is, therefore, also found in the Commission's own files. *Falasco v. Pennsylvania Board of Probation and Parole*, 104 Pa. Commw. 321 (1987). This certification list plainly establishes that appellant's score "75" was such that she could not have been selected for this position as a matter of law, since she was not included within the group of candidates who were available to be considered within the rule of three[1]. 71 P.S. Section 741.602.[2]

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[1]The rule of three imposes a requirement that when making a selection from a certification list, an appointing authority must select from among the candidates who have obtained the highest three scores on the list.

[2]"If a vacant position is to be filled, an appointing authority may request the director to issue an appropriate certification of eligibles unless a labor agreement contains promotion procedures, which are inconsistent with this Act, in which case the terms of such labor agreement shall be controlling. The certification of eligibles shall be valid for sixty-workdays. If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the three highest ranking of available persons on the certification of eligibles."

Since appellant was not, as a matter of law, in actual competition with Ms. Doneker for selection to this position, she lacks standing to challenge her non-selection on the basis of a claim of discrimination. She is simply not a "person who is aggrieved" within the meaning of Section 951(b) of the Act, 71 P.S. Section 741.951(b). Accordingly, this appeal is properly dismissed and the record closed in this matter.

State Civil Service Commission
/s/

_____
Katherene E. Holtzinger Conner, Esquire
Chairman

MAILED: June 24, 2003

U.S. Const. art. III, sec. 2, cl. 1.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U. S. Const. amend. XIV, sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.A. sec. 1257(a). State Courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C.A. sec. 2000e-2(h). Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

PA. STAT. ANN. tit. 71

sec. 741.2. Purpose – Greater efficiency and economy in the administration of the government of this Commonwealth is the primary purpose of this act. The establishment of conditions of service, which will attract to the service of the commonwealth qualified persons of character and ability and their appointment and promotion on the basis of merit and fitness are means to this end.

sec. 741.3 (d)(2) "All positions now existing or hereafter created in the Department of Labor and Industry which are charged ...with the administration of the Workmen's Compensation Act and the Occupational Disease Act, including the positions of workmen's compensation referees ...."

sec. 741.3(e) "'Appointing authority' means the officers, board, commission, person or group of persons having power by law to make appointments in the classified service."

sec. 741.3(f) "'Position' means a group of current duties and responsibilities assigned or delegated by competent authority requiring the full-time or part-time employment of one person."

sec. 741.3(g) "'Class' or 'class of positions' means a group of positions in the classified service which are sufficiently similar in respect to the duties and responsibilities thereof that the same descriptive title may be used for each of such positions, the same requirements as to experience, knowledge and ability are demanded of incumbents, the same tests of fitness may be used to choose qualified appointees, and the same schedule of compensation may be made to apply with fairness under like working conditions."

sec. 741.3(n) "'Employment list' means a list of persons who have been found qualified by an entrance examination for appointment to a position in a particular class."

sec. 741.3(o) "'Promotion list' means a list of persons who have been found qualified by a promotion examination for appointment to a position in a particular class."

sec. 741.3(p) "'Eligible list' means an employment list, a promotion list or a reemployment list."

sec. 741.3(q) "'Eligible' means a person whose name is on an eligible list."

sec. 741.3(u) "'Promotion' means the movement of an employe to another class in a pay range with a higher maximum salary."

sec. 741.201(c) "Any person appointed as a member of the commission shall be a citizen and legal resident of the Commonwealth for a period of not less than one year who is in sympathy with modern personnel methods and the application of merit principles to public employment. No person who, within one year preceding his appointment, has been an officer of a political party shall be eligible to serve as a commissioner."

sec. 741.205. Qualifications, Appointment and Compensation of Director–"The director shall be a person who shows he is familiar with the principles and methods of personnel administration and one who is in sympathy with the application of merit principles and scientific methods to public employment. He shall be appointed by the commission and serve at the pleasure of the commissioners. His salary shall be fixed by the commission with the approval of the Governor, and he shall hold no other paid public position.

sec. 741.206. Powers and Duties of Director–"Under the direction and supervision of the commission, the director, except as otherwise provided in this act, shall direct and supervise the administrative work of the commission. The director shall have power and the duty–...

(5) To administer and make effective the provisions of this act and of the rules made thereunder, including those relating to the preparation and conduct of examinations, the preparation of eligible

lists, the certification of persons qualified for employment, te transfer, promotion, suspension, demotion, removal, furlough, leave of absence and resignation of employes, the rating of employes' services, the requiring of health examinations at the discretion of appointing authorities as a condition of initial or continued employment."

sec. 741.208. Public Hearings–"Before adopting or amending its rules, the commission shall hold a public hearing at which any citizen shall have the right to appear and be heard. Public notice of such public hearing shall be given at least seven days in advance of the hearing by posting on a bulletin board maintained in or near the commission's principal office, in a place accessible to the public during business hours, a statement of the time and place of the hearing and of the matter to be considered, also by furnishing at least twenty copoeis of such notice to the newspaper correspondents' office in the State Capitol andone copy of such notice to the Governor, each appointing authority and each member of the General Assembly. The commission may give further public notice of such hearings as it deems advisable."

sec. 741.209. Oaths, Testimony and Production of Papers–"Each member of the commission, the director, and any other employe or agent authorized by the commission, shall have the power to administer oaths in matters pertaining to the work of the commission. The commission shall have the power to secure by subpoena the attendance and testimony of witnesses and the production of books and papers. Any judge of a court of record, either in term time or in vacation, shall, upon proper application of the commission, compel the attendance of witnesses, the production of books and papers and the giving of testimony before the commission by attachment for contempt, or otherwise, in the same manner as the production of evidence may be compelled before such court."

sec. 741.210. Records Open to the Public–"The minutes of the commission shall be preserved as permanent records. The correspondence, eligible lists, other papers and records of the commission, applications, examination records, other documents

submitted by candidates and records of candidates who do not report for one or more parts of an examination shall be maintained for periods established inteh commission's records retention schedule, which may, upon publication of notice in the Pennsylvania Bulletin, be changed at the discretion of the commission tomeet the criteria and needs of the commission. The commission and its director, in its deliberations, may rely on computerized or electronically or mechanically reproduced records. On written rquest, supported by justificaiton acceptable to the director, and subject to reasonable regulation, all records of the commission shall be open to public inspection during ordinary business hours, except as herein specifically otherwise provided. The director shall take all due precautions to prevent the securing in advance by any unauthorized person of questions or other material to be used in any test unless such questions or materials are available to all competitors. The director shall prevent the identification by any examiner or other persons, where identity is concealed, of papers or work of any competitor in an examination before the papers or work of all competitors in that examination have been rated. Statements of former employers of competitors in examinations shall be considered confidential and not open to inspection.

sec. 741.501. Examinations Requisite for Appointment and Promotion–(a) "Except as otherwise provided in this act, appointments of persons entering the classified service or promoted therein shall be from eligible lists established as the result of examinations given by the director to determine the relative merit of candidates. Such examinations may be written and shall be competitive and open to all persons who may be lawfully appointed to positions within the classes for which the examinations are held, except that persons in unskilled positions shall enter the clssified service by promotion without examination provided:...

(c) The director shall prepare the proper State and district employment and promotion eligible lists:...

(d) The commission may limit competition in promotion examinations to employes in the classified service who have completed their probationary period in a class or classes designated

in the public notice of the examinations, and may permit promotiosn to be accomplished by any one of the following plans:

(1) by appointment from open competitive lists; or

(2) by achieving a place on an eligible list after a promotional examination, such examination having been given at the request of the appointing authority; or

(3) by promotion based upon meritorious service and seniority to be accomplished by appointment without examination, if the person has completed the probationary period in the next lower position and meets the minimum requirements for the higher position.

sec. 741.502. Nature of Examinations–"The director shall give examinations to establish employment and promotion lists...."

sec. 741.506. Establishment of Eligible Lists–"The director shall establish and maintain such eligible lists as are necessary or desirable to meet the needs of the service. These lists shall contain the names of those persons who have been found qulaified for and have successfully passed the examination and shall be arranged in the final earned ratings.

sec. 741.507. Duration of Eligible Lists–"The duration of an eligible list shall be fixed by the director with the approval of the commission for a period of up to four years. An existing eligible list shall terminate upon the establishment of an appropriate new list unless otherwise prescribed by the director. Appointing authorities shall utilize eligible lists from the date of their establishment until exhausted, cancelled by the commission, or replaced by more recently prepared lists. The director, with the approval of the commission, may at any time correct clerical errors occurring in connection with the preparation of any eligible list and revise the list accordingly, but no person who has been appointed as the result of certification from such list shall be displaced by such action. The commission shall have the power at any time after giving notice as

required in this act, and after a public hearing, to cancel the whole or any part of any eligible list on account of illegality or fraud in connection therewith.

sec. 741.601. Certification–Whenever a vacancy is likely to occur or is to be filled in the classified service, the appointing authority shall submit to the director a statement indicating the position to be filled. Unless the appointing authority elects to follow one of the alternative procedures provided for in this act, or unless there is in existence a labor agreement covering promotions in the classified service, in which case the terms and procedures of such labor agreement relative to the procedures for promotions shall be controlling, the director shall certify to the appointing authoirty the names of the three eligibles who are highest on the appropriate promotion list or employment list, whichever is in existence, or from the one, which under the rules of the commission, has priority. If the appropriate employment or promotion certification of eligibles contains fewer than three eligibles who are willing to accept appointment, or if there is no appropriate eligible list, the appointing authority may appoint an available eligible from the approved list or request the director to certify from such other list or lists as the director deems the next most nearly appropriate. If operational conditions of the appointing authority so dictate and it is found to be in the interest of the service to the Commonwealth, the commission may authorize selective certifications based on standards to be prescribed by the commission. Any person on any promotion or employment lsit who waives consideration for promotion or appointment need not be considered among the names from which a promotion or appoinment is to be made.

sec. 741.602. Selection and Appointment of Eligibles–If a vacant position is to be filled, an appointing authority may request the director to issue an appropriate certification of eligibles .... The certification of eligibles shall be valid for sixty-work days. If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the three highest ranking available persons on the certification of eligibles. In making the second, third or any additional selection from the

eligibles on an employment or promotional certification, each selection shall be from among the three highest scoring available persons remaining on such certification of eligibles. After a person has been rejected three times by an appointing authority in favor of others on the same eligible list, such person shall not again be certified to that appointing authority, except upon written request from the appointing authority. Appointing authorities shall promptly report to the director the appointment of eligibles who have been certified. If a certified eligible refuses to accept an offer of employment, such refusal shall be promptly investigated by the director and, if it be found that the refusal has been made for improper or insufficient reasons, the director shall after giving ten days' notice to such person remove the eligible from the list.

sec. 741.901a. Commission to Make Periodic Audits of Employes.–The commission is hereby authorized to and is held responsible for conducting audits of changes in employment and promotions of employes in the various departments, bureaus and agencies under its jurisdiction, to assure strict compliance with this act and the commission rules and regulations.

sec. 741.905a. Prohibition of Discrimination–No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

sec. 741.951. Hearings–....

(b) Any person who is aggrieved by an alleged violation of Section 905a of this act may appeal in writing to the commission within twenty calendar days of the alleged violation. Upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing....

sec. 741.1001. Transfer of Records–All lists of eligibles previously established or certified which have not been replaced by later lists of

eligibles on the effective date of this Act, and all books, papers, records, documents, supplies, materials and equipment relating to or used in connection with any merit system in the service of the Commonwealth in effect on the effective date of this act are hereby transferred from the department, board or agency heretofore charged with the administration of such merit system to the commission on the effective date of this act.

Such lists of eligibles shall be used for appointments by the commission in the same manner as hereinbefore provided until examinations shall have been held by the commission and new lists of eligibles prepared pursuant thereto. All persons whose names remain on any existing list of eligibles shall be retained thereon for at least one year from the date when the list was established and thereafter until the list is replaced by a more recently prepared list. If any applications have been filed for an examination or any examination have been held, but no lists of eligibles established, in connection with any merit system in the service of the Commonwealth in effect on the effective date of this act, such applications and examinations transferred to the commission shall have the same force and effect as if the applications had been filed with or the examinations held by the commission.

sec. 95.42 (relating to preservation of examination records) is incidentally amended for clarification and to eliminate confusion. Eligible lists are constantly changing as things are added and removed. This process is done by computer and any eligible list that existed at any point in time is able to be reconstructed electronically thereafter. As formerly worded, sec. 95.42 implied that there is a single, unified eligible list that results from a single examination. In the age of computerized testing, this is no longer the case.

COMMONWEALTH OF PENNSYLVANIA

Sharon F. Zanotto :	State Civil Service Commission
:	
v. :	
:	
State Civil Service : Commission :	Appeal No. 24004

Sharon F. Zanotto *Pro Se*	Michele D. Rothstein Dolbin Attorney for State Civil Service Commission

ADJUDICATION

This is an appeal by Sharon F. Zanotto challenging the finding by the State Civil Service Commission[1] that she was not eligible for the position of Workers' Compensation Judge. A hearing was held September 23, 2004, in the Strawberry Square Complex in Harrisburg, Pennsylvania, before Hearing Officer Lynne M. Mountz.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the SCSC discriminated against appellant in finding her ineligible for Workers' Compensation Judge.

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[1] To avoid confusion, "Commission" will be used to indicate the adjudicatory branch of the State Civil Service Commission and "SCSC" will be used to indicate the administrative branch.

FINDINGS OF FACT

1. By letter dated July 2, 2004, appellant was advised by the SCSC that she was ineligible for the position of Workers' Compensation Judge. Comm.Ex.A.

2. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.

3. Appellant graduated from law school in May 2000. N.T. pp. 17-18.

4. Appellant was admitted to the bar of Pennsylvania on October 23, 2000. N.T. p. 19; Ap.Ex.3.

5. In late spring of 2001, appellant applied to take the Workers' Compensation Judge exam, but was found ineligible by the SCSC. N.T.p.15.

6. Appellant did not challenge the determination of ineligibility in 2001. N.T. p. 15.

7. On May 3, 2004, appellant applied to take the Workers' Compensation Judge exam pursuant to Test Announcement 2004-427, issued April 30, 2004. N.T.p. 21.

8. Test Announcement 2004-427 included the following:

Minimum Requirements:

Five years of Workers' Compensation practice before administrative agencies or equivalent experience.

Equivalent experience is defined as experience practicing before administrative agencies or courts of record on cases that involved the relationship between a person's physical or psychological impairment and his or her ability to work. This experience must have been in the capacity of one or a combination of the following:

- Presiding over judicial or quasi-judicial proceedings as a judge, magistrate, or hearing officer.

- Acting as a legal representative in judicial or quasi-judicial proceedings. (Experience assisting other attorneys in the actual hearing is considered acceptable.)

- Experience as a law clerk or opinion writer.

NOTE: If you did not work full-time in an acceptable area of the law, but you have, over several years, handled some cases that were related (e.g. social security disability, personal injury, workers' compensation, etc), your experience will be prorated to determine if you have the equivalent of five years of full-time experience. It is, therefore, very important for you to indicate on your application the number of hours you worked per week and the percentage of time you spent working in a related area of law. If you do not include this information on your application, you may be deemed ineligible.

Be sure to list your Attorney I.D. number in Block 9 of your Application for Employment/Promotion.
Ap.Ex. 6.

9. The class specifications for Workers' Compensation Judge list the Minimum Experience and Training requirements as, "Five Years of Workers' Compensation practice before administrative agencies or equivalent experience."[2] SCSC Ex.2.

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[2] A "Necessary Special Requirement" for the position requires that the candidate "[b]e an attorney in good standing before the Supreme Court of Pennsylvania." SCSC Ex. 1.

10. The Evaluation Guide used by the SCSC in determining eligibility for Workers' Compensation Judge provides, "**Only experience gained <u>after</u> graduation from an approved school of law will be considered acceptable.**" SCSC Ex.2.

11. Beginning in April 1992, appellant began working as a paralegal for Central Penn Legal Services. N.T. p. 23.

12. Part of appellant's caseload as a paralegal involved representing individuals seeking supplemental security income from the Social Security Administration. Appellant devoted approximately two days per week to this caseload. N.T. pp. 25, 31.

13. During the three years that appellant served as a paralegal for Central Penn Legal Services, she handled approximately 88 cases before the Social Security Administration. N.T. p. 26.

14. After her graduation from law school, appellant worked for two years and five months as an Attorney Examiner for the Bureau of Workers' Compensation. N.T. pp. 33, 34.

15. From October 2002 through the time of her hearing, appellant was an Unemployment Compensation Referee. N.T. pp. 34-35.

16. Patricia Eby, a Human Resource Analyst 2 with the SCSC, evaluated all of the applicants for the Workers' Compensation Judge exam in 2004 to determine eligibility. N.T. p. 46.

17. Eby found appellant ineligible for the Workers' Compensation Judge position. N.T. p. 49.

18. In making her determination of ineligibility, Eby used the job specifications and the Evaluation Guide – she did not consider appellant's gender or the number of male and female applicants for Workers' Compensation Judge. N.T. pp. 48-49, 51.

19. On May 30, 2001, Michael Smith completed a civil service application for Workers' Compensation Judge. Ap. Ex. 1.

20. The class specifications for the Workers' Compensation Judge position were the same in 2001 and 2004. SCSC Ex. 1.

21. Smith indicated on his application that he graduated from law school in May 2000. Ap. Ex. 1.

22. Smith was admitted to the bar on May 7, 2001. N.T. p. 19; Ap. Ex. 2.

23. Smith indicated on his application that the had four years and seven months experience with the Department of Labor and Industry as a Disability Hearing Officer beginning in October 1996. Ap. Ex. 1.

24. Smith indicated on his application that he had served as a Disability Claims Adjudicator 2 with the Department of Labor and Industry from June 1991 until October 1996. Ap. Ex. 1.

25. Smith indicated on his application that he had served as a Disability Adjudication Supervisor with the Department of Labor and Industry from June 1983 until June 1991. Ap. Ex. 1.

26. Smith was found eligible for the Workers' Compensation Judge position and was allowed to take the exam in 2001.[3] N.T. p. 18.

27. Smith received a final earned rating of 75.00 on the exam and appeared on the list of eligibles for Workers' Compensation Judge through August 31, 2004. N.T. pp. 56, 71; Ap. Ex. 4; SCSC 2005. Ex. 4.

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[3] Eby did not make the eligibility determination for Smith in 2001. N.T. p. 55.

28. Smith was not appointed to a Workers' Compensation Judge position and was purged from the list of eligibles on September 1, 2004. N.T. p. 56; SCSC Ex. 4.

DISCUSSION

The issue in the present appeal is whether the appellant has established that the SCSC's determination that she was ineligible for the position of Workers' Compensation Judge was the result of discrimination. An individual who is challenging an eligibility determination by the SCSC may do so only on the basis of discrimination in violation of Section 905.1 of the Civil Service Act. *Pronko v. Commonwealth of Pennsylvania, Department of Revenue*, 114 Pa.Commw. 428, 437, 539 A.2d 456, 461 (1988). Appellant has alleged discrimination based upon sex and a violation of the Civil Service Act/Rules. Comm.Ex.B. Specifically, appellant alleged that the SCSC had told her that she must be licensed to practice law for five years in order to take the Workers' Compensation Judge exam, but that a male who had been licensed for less than five years was allowed to take the exam and remains on the list. Comm. Ex. B.

In an appeal alleging discrimination, appellant bears the burden of establishing that the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990). In analyzing claims of discrimination[4] under Section 905.1 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 P.S. sec. 741.951(b); 4 Pa.Code sec. 105.16; *Department of Health v.*

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[4] The Act addresses both "traditional" and "procedural" discrimination. "Traditional discrimination" encompasses only those claims of discrimination based on race, sex, national origin or other non-merit factors. "Procedural discrimination" refers to a technical violation of the Act. In a case where an employee alleges a technical violation, no showing of intent is required. There must be evidence, however, to show that the employee was harmed by the technical noncompliance or that because of the peculiar nature of procedural impropriety that he or she could have been harmed but there is no way to prove that for certain. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (1988); 71 P.S. sec. 741.905a.

Nwogwugwu, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has been established, the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for its action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretext. *Id.* At 614-615. In particular, an employee claiming disparate treatment must demonstrate that he or she was treated differently than others similarly situated. *Nwogwugwu*, at 141 Pa. Commw. 40, 594 A.2d 851 (1991).

Appellant testified on her own behalf in support of her appeal. Appellant graduated from law school in May 2000 and was admitted to the bar of Pennsylvania on October 23, 2000. N.T. pp. 17-19; Ap. Ex. 3. In late spring of 2001, appellant applied to take the Workers' Compensation Judge exam, but was found ineligible by the SCSC. N.T. p. 15. Appellant did not challenge the determination of ineligibility in 2001. N.T.p.15.

Appellant testified that on May 3, 2004, she applied to take the Workers' Compensation Judge exam pursuant to Test Announcement 2004-427, issued April 30, 2004. N.T. p. 21. Test Announcement 2004-427 provided, in relevant part:

Minimum Requirements:

Five years of Workers' Compensation practice before administrative agencies or equivalent experience.

Equivalent experience is defined as experience practicing before administrative agencies or courts of record on cases that involved the relationship between a person's physical or psychological impairment and his or her ability to work. This experience must have been in the capacity of one or a combination of the following:

- Presiding over judicial or quasi-judicial proceedings as a judge, magistrate, or hearing officer.

- Acting as a legal representative in judicial or quasi-judicial proceedings. (Experience assisting other attorneys in the actual hearing is considered acceptable.)

- Experience as a law clerk or opinion writer.

NOTE: If you did not work full-time in an acceptable area of the law, but you have, over several years, handled some cases that were related (e.g. social security disability, personal injury, workers' compensation, etc), your experience will be prorated to determine if you have the equivalent of five years of full-time experience. It is, therefore, very important for you to indicate on your application the number of hours you worked per week and the percentage of time you spent working in a related area of the law. If you do not include this information on your application, you may be deemed ineligible.

Be sure to list your Attorney I.D. number in Block 9 of your Application for Employment/Promotion. Ap.Ex. 6.

Appellant notes that the test announcement does not require that qualifying experience be obtained after becoming licensed to practice law. N.T. p. 32. Appellant testified concerning her work experience prior to her graduation from law school – experience that she believes should be counted towards the experience necessary to be found eligible for Workers' Compensation Judge. For a period of approximately three years beginning in April 1992, appellant worked as a paralegal for Central Penn Legal Services. N.T. pp. 23, 26. According to appellant, she devoted approximately two days per week to the representation of individuals seeking

supplemental security income from the Social Security Administration. N.T. pp. 25, 31. While a paralegal, appellant handled approximately 88 cases before the Social Security Adminstration. N.T. p. 26. Appellant also testified concerning her post-graduation work experience, which she believes should be counted towards her eligibility for Workers' Compensation Judge. Appellant worked for two years and five months as an Attorney Examiner for the Bureau of Workers' Compensation. N.T. pp. 33, 34. From October 2002 through the time of her hearing, appellant was an Unemployment Compensation Referee.[5] N.T. pp. 34-35.

Appellant compared her treatment with that of Michael Smith, an individual in the same graduating class from law school as appellant. Smith was found eligible for Workers' Compensation Judge and was allowed to take the exam in 2001. N.T. p. 18. According to appellant, the test announcement from 2001 was virtually identical to the 2004 test announcement. N.T. p. 16. On May 30, 2001, Smith completed a civil service application on which he indicated that he graduated from law school in May 2000.[6] Ap.Ex.1. Smith further indicated his work experience on the application, which included the following experience with the Department of Labor

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[5] According to appellant, a person's "ableness and availability to work is an issue" in every unemployment compensation case. N.T. p. 35.

[6] Smith was admitted to the bar on May 7, 2001. N.T. p. 19; Ap. Ex. 2.

and Industry obtained before he graduated from law school:

- Four years and seven months experience as a Disability Hearing Officer beginning in October 1996.

- Serving as a Disability Claims Adjudicator 2 from June 1991 until October 1996.

- Serving as a Disability Adjudication Supervisor from June 1983 until June 1991. Ap.Ex.1.

Smith was found eligible for Workers' Compensation Judge by the SCSC and was allowed to take the exam in 2001. N.T. p. 18. Smith received a final earned rating of 75.00 on the exam and appeared on the list of eligibles through August 31, 2004.[7] N.T. pp. 56, 71; Ap.Ex. 4; SCSC Ex. 4. Appellant's basic argument is that the SCSC credited Smith's experience prior to his graduation from law school in finding him eligible to take the Workers' Compensation Judge exam in 2001, yet did not give appellant credit in 2004 for the portion of her pre-graduation work experience which she asserts, in combination with her post-graduation experience,

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[7] The list life for the Workers' Compensation Judge position is three years. SCSC Ex. 4. There is no indication in the record that Smith had applied to take the Workers' Compensation Judge exam in 2004.

meets the eligibility requirements for taking the exam.[8]

In response to appellant's presentation, the SCSC presented the testimony of Patricia Eby and Bridget Bailey. Eby is a Human Resource Analyst 2 with the SCSC. N.T. p. 46. Eby testified that she evaluated all of the candidates who applied to take the Workers' Compensation Judge exam in 2004 in order to determine their eligibility to take the exam. N.T. pp. 46-47. Eby used the class specifications and an Evaluation Guide when evaluating the candidates' eligibility for the position. N.T. pp. 47-48. The class specifications for Workers' Compensation Judge, which were the same in 2001 and 2004, list the Minimum Experience and Training requirements as "Five years of Workers' Compensation practice before administrative agencies or equivalent experience."[9] N.T. p. 47; SCSC Exs. 1, 2. The Evaluation Guide provides, "**Only experience**

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[8] At the close of the appellant's presentation, the SCSC entered a motion to dismiss the appeal for failure to establish a *prima facie* case of discrimination. N.T. p. 43. The Hearing Officer deferred ruling on the motion at the hearing. N.T. p. 45. The motion is hereby denied.

[9] The minimum requirements for the Workers' Compensation Judges are provided for in 77 P.S. sec. 2503. This section requires, in relevant part, that an individual be an attorney in good standing before the Supreme Court and "[h]ave five years of workers' compensation practice before administrative agencies or equivalent experience." 77 P.S. sec. 2503(2).

gained <u>after</u> graduation from an approved school of law will be considered acceptable." SCSC Ex. 2.

Eby testified that in determining that appellant was ineligible, Eby used the class specifications and the Evaluation Guide – she did not consider appellant's gender or the number of male and female applicants for Workers' Compensation Judge. N.T. pp. 48-49, 51. According to Eby, only experience gained after graduation from law school could be used to satisfy the experience requirement for Workers' Compensation Judge. N.T. p. 49. Eby found appellant ineligible because appellant did not have enough experience performing workers' compensation law. N.T. p. 51. Eby did not give appellant credit for her pre-graduation experience as a paralegal at Central Penn Legal Services. N.T. p. 49.

On cross-examination, Eby conceded that applicants only have access to the test announcement to determine if they are eligible to take an exam. N.T. p. 60. Eby testified that she does not believe that appellant has five years of practice before administrative agencies in the Workers' Compensation field or equivalent experience. N.T. p. 61. Eby explained that when evaluating appellant's eligibility, she gave appellant full credit for her two years and five months experience as an Attorney Examiner/Compliance Manager. N.T. p. 61. Eby did not give appellant credit for the time that she served

as an Unemployment Compensation Referee[10] because not all unemployment compensation cases deal with whether an individual has a physical or psychological impairment, which relates to their ability to work. N.T. p. 62. Eby explained that, as indicated on the test announcement, equivalent experience must be in cases involving the relationship between a person's physical or psychological impairment and their ability to work. N.T. p. 62.

Concerning Smith, Eby testified that she did not perform the eligibility determination for Smith in 2001. N.T. pp. 55, 69. Smith was placed on the eligible list for Workers' Compensation Judge on August 21, 2001 for a period of three years. N.T. p. . 74. Eby testified that she believed the determination that Smith was eligible to take the Workers' Compensation Judge exam in 2001 was erroneous. N.T. pp. 69-71. Smith was not appointed to a Workers' Compensation Judge position and his name was purged from the eligible lists on September 1, 2004. N.T. p. 56.

Bridget Bailey, a Human Resource Analyst 2 in the Test Development Unit of the SCSC, was the analyst assigned to develop the exam for Workers' Compensation Judge in 2004. N.T. pp. 77-78, 80. Bailey testified that she did so in conjunction with

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[10] Appellant did not prorate the amount of experience that she asserted was qualifying from her Unemployment Compensation Referee experience. SCSC Ex. 3.

subject matter experts. N.T. p. 78. Subject matter experts are individuals who have significant experience with the job title in question who are consulted during the development of the examination. N.T. p. 78-79. According to Bailey, an Evaluation Guide is developed in conjunction with subject matter experts for every class specification. N.T. p. 80. Bailey testified that she participated in the development of the Evaluation Guide for Workers' Compensation Judge in April 2004. N.T. p. .80. Bailey testified that the criteria in the Evaluation Guide is based upon the minimum experience and training requirements and what the subject matter experts were chosen by the Department of Labor and Industry. N.T. p. 81. Bailey also testified that there were not any substantive changes in the 2004 Evaluation Guide compared with the 2001 Evaluation Guide. N.T. pp. 80, 83. Bailey did not obseve any attempt in the development of the Evaluation Guide to cull out any potential applicants based upon their gender. N.T. p. 82.

Having carefully reviewed the evidence in the present case, we find that appellant has failed to persuade us that the SCSC's determination that she was ineligible for the Workers' Compensation Judge position was the result of discrimination. Eby credibly testified that when making determinations of eligibility for the position, she did not consider the gender of the candidates, nor did she consider the number of male and female applicants. Eby relied on the job specifications and the Evaluation Guide when determining that appellant was not eligible for the position. It is clear from the Evaluation Guide that

work experience used to find an applicant eligible for Workers' Compensation Judge must be obtained after graduation from law school. Based upon this neutral criterion, the SCSC correctly determined that appellant is not eligible for the Workers' Compensation Judge position because she did not have the requisite five years of equivalent experience after graduation and should not have been allowed to take the exam in 2004.

With regard to Smith having been found eligible and being permitted to take the exam in 2001, it appears from the record that he was found eligible in error. In accordance with the Evaluation Guide, any of Smith's experience gained prior to his graduation from law school should not have been used to find him eligible to take the Workers' Compensation Judge exam. However, because Smith was allegedly found to be eligible to take the exam in error, it does not follow that the error should be compounded by finding that appellant is also eligible to take the exam. We also note that while Smith was found eligible and appeared on certifications issued between August 2001 and August 2004, he was not hired for a Workers' Compensation Judge position and has been purged from the list of eligibles for that position. We note, however, that future test announcements for the Workers' Compensation Judge position should clearly indicate that only experience obtained after graduation from law school will be considered qualifying. Accordingly, we enter the following

CONCLUSION OF LAW

The appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Sharon F. Zanotto challenging the SCSC's determination that she was ineligible for the position of Workers' Compensation Judge and sustains the action of the SCSC in finding Sharon F. Zanotto ineligible for Workers' Compensation Judge.

State Civil Service Commission

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Katherene E. Holtzinger Conner, Esquire
Chairman

_____
James W. Martin
Commissioner

_____
Marwan Kreidie
Commissioner

Mailed: November 17, 2004